Armour v. *Fort Morgan Steamship Co.*, 270 U. S. 253, at pages 258, 259;
Lambert Co. v. *Baltimore & Ohio R. R. Co.*, 258 U. S. 377, at page 382;
The Katahdin, 293 Fed. 824, at page 826;
The Paul L., 4 F. Supp. 537, at page 540.

In *The Paul L.*, 4 F. Supp. 537, at page 540, the Court said:

> "Admiralty jurisdiction was heretofore challenged, but on the face of the libel admiralty jurisdiction was stated. The evidence on trial developed a condition which shows that the libel concealed jurisdictional facts, and the prior ruling on the jurisdictional facts does not confer jurisdiction when none in fact existed."
>
> "Such simple evasions certainly could not succeed", *United States Merchants' & Shippers' Ins. Co.* v. *A/S den Norske Afrika, etc.*, 65 F. (2d) 392, 393.

That the true facts were not alleged in the case in suit has been demonstrated. It also appears in the record that the collision occurred in the territorial waters of Brazil, between a Brazilian ship and a German ship, and that all of the cargo damaged belonged to foreigners, predominantly to Germans. The record also shows that the only American interest pleaded was that of The Great American Insurance Company, as subrogee. It later appeared that this interest was limited to 2½% of a claim of $6,500, which had not been paid in full. The record also established when disclosure was made after trial, that the entire interest of all American underwriters were but fractional parts of claims and amounted after all of them were added together to no more than $599.84 out of a mass of claims totalling $350,000.

The Circuit Court of Appeals disregarded undisputed facts and the situation between the parties when it said that: "the allegations in the libels did not mislead it [the petitioner] in any important particular", and that "the petitioner must have known all along that the title of The Great American to claims against the 'Mandu', whether by subrogation or assignment, came from foreign interests" (R. 738f). The source of the alleged ownership was known from the time that The Great American Insurance Company was forced to amend its first libel (R. 29) and give that information, but after this amendment and persistently thereafter The Great American Insurance Company swore that it was the beneficial owner of the claims and that it had acquired them for a valuable consideration (R. 95, 109).

The Circuit Court of Appeals set up a straw man and knocked him down. We submit that the District Court was clearly right when it exercised its discretion to refuse to retain jurisdiction of the foreign interests "at the stage which the case had reached" (R. 738e). The District Court during the course of trial admonished counsel for The Great American in the following language:

> "If the insurance company wanted to bring the owners of the vessel into court and have their vessel sold and pay their debts, they must take steps to do that, and those steps must be authorized by the facts and by the law. So that you have, in a sense, brought into this court this company, Lloyd Brasileiro, by a libel which, if the facts had been known, would have been open to dismissal" (R. 291).

The motion to dismiss was made at the trial immediately when it appeared from the evidence that the allegation

that The Great American Insurance Company was the owner of the claims was untrue. Your petitioner's motion could not have been made earlier for prior to that time the fact that the allegation of ownership was untrue had not appeared. The fact that the basis for the motion did not appear until a late stage of the litigation when the rights of the real parties in interest might have been prejudiced in other jurisdictions was due solely to the attempt of those interests to support their claim to jurisdiction in the Courts of the United States by allegations then "shown to be false" (R. 638). The situation was thus summed up by the District Court:

> "You are here on limitation proceedings, but the limitation proceedings were precipitated and caused and made necessary by a libel which turns out to have been improperly filed, assuming that there is no proof, and therefore the whole thing starts with an attempt to get jurisdiction in this court by a false statement" (R. 294).

Under such circumstances, the Circuit Court of Appeals should have applied the principle laid down by the Court in *Barney* v. *Baltimore City*, 6 Wall. (73 U. S.) 280, at p. 288: "that the court will not, under such circumstances, give effect to what is a fraud upon the court, and is nothing more".

The Circuit Court of Appeals seemed to be a bit uneasy about its decision because it proceeded to say that "for jurisdictional purposes the case may be treated as one where the adversaries were German shippers on the one side and a Brazilian shipowner on the other" (R. 738e) and that nevertheless because "on such a basis the foreigners interested were of different nationalities; they had no common home to which they might be sent to try the case; no agreement had been made that litigation be

carried on in a particular country. Under these conditions it would have been unusual to have declined jurisdiction even at an early stage" (R. 738e). For a court of this country to accept jurisdiction of a suit between foreigners because it is feared that the courts of neither of the litigants is sufficiently fairminded to try the case as a strong doctrine. To say that neither the Courts of Brazil nor the Courts of Germany are competent to adjudicate a suit in which their respective citizens are involved, may or may not be to state a truth, but certainly it is a sentiment which would be best for a court to keep within its own bosom. The fact, as found by both Courts below, that the German owners of the "Denderah" made no claim against the "Mandu" or her owners in the Courts of either Germany or Brazil (Fdg. 7, R. 2174, R. 2206) indicates that the German cargo interests attempted to invoke the jurisdiction of the Courts of the United States in an effort to secure the application of a rule of law more favorable to the cargo owners than would have been applied in the Courts of the countries where the action should appropriately have been brought.

The principle announced by the decision of the Circuit Court of Appeals if left undisturbed will be a standing invitation to foreigners of whatever nationality to bring their causes, wherever arising, to the Courts of the United States for adjudication on the ground that the parties litigant "have no common home to which they might be sent to try their case". We submit that this is a dangerous precedent and that the decision of the Circuit Court of Appeals should be reviewed and reversed.

There is no judicial support for the view expressed by the Circuit Court of Appeals. The cases cited by that Court—*The Belgenland*, 114 U. S. 355 and *Thomassen* v. *Whitwell*, 9 Ben. 113, Fed. Cas. No. 13928, have no applica-

tion. Each of those cases involve collisions which occurred on the high seas, whereas the present case involves a collision which occurred within the territorial waters of Brazil.

POINT III.

The decision of the Circuit Court of Appeals holding the "Mandu" contributorily at fault and your petitioner liable for one-fifth of the damages because of "inferential faults" on the part of the "Mandu" is in conflict with the decisions of this Court in *The City of New York*, 147 U. S. 72, 85, *The Victory and The Plymothian*, 168 U. S. 410, 423, and other cases, and in conflict with the decisions in all other circuits.

The Circuit Court of Appeals held that the faults of the "Denderah" were "numerous and glaring" (R. 2206) and that they were "gross faults" (R. 2209). In fact, it held that the faults of the "Denderah" "were four times as serious in degree as those of the 'Mandu'" (R. 2208). Such fault, as was found on the part of the "Mandu" was not established by competent proof. The Circuit Court of Appeals held only that—"An injury so extensive indicates a very considerable speed by the 'Mandu' at the time of the impact and justifies an inference either that she was proceeding too fast when danger first became apparent, or (fols. 2210-2230) else that she should have discovered the danger and reversed earlier" (R. 2208). The Court, therefore, found the "Mandu" guilty of "inferential faults". The Court did not say when "danger first became apparent" or when the "Mandu" "should have discovered the danger" but did find that the "Mandu" was reversing at full speed at the time of the collision and during part of

the period of four minutes preceding the collision (R. 2206). There was no evidence that the speed of the "Mandu" was excessive prior to the time when danger first became apparent.

The decision of the Circuit Court of Appeals is squarely in conflict with the decision of this Court in the case of *The City of New York*, 147 U. S. 72, where this Court said at page 85:

> "Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is, of itself, sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. There is some presumption at least adverse to its claim, and any reasonable doubt with regard to the propriety of the conduct of such other vessel should be resolved in its favor."

This Court announced the same doctrine in the case of *The Victory and The Plymothian*, 168 U. S. 410, where this Court said at page 423:

> "As between these vessels, the fault of the 'Victory' being obvious and inexcusable, the evidence to establish fault on the part of the 'Plymothian' must be clear and convincing in order to make a case for apportionment. The burden of proof is upon each to establish fault on the part of the other."

This rule has been repeatedly laid down by this Court:

The Great Republic, 23 Wall. 20, 25;
The Oregon, 158 U. S. 186, 197;
The Umbria, 166 U. S. 404, 409.

The same rule has been applied in all other Circuits.

The Priscilla (C. C. A. 1), 55 F. (2d) 32, 37;
Le Flandre (C. C. A. 3), 9 F. (2d) 331, 332;
The Lizzie M. Walker (C. C. A. 4), 3 F. (2d) 921, 922;
The Wolsum (C. C. A. 5), 14 F. (2d) 371, 376;
Lake Erie Transp. Co. v. *Gilchrist Transp. Co.* (C. C. A. 6), 142 Fed. 89, 95;
Goodrich Transit Co. v. *City of Chicago* (C. C. A. 7), 4 F. (2d) 636, 638;
Northern Nav. Co. v. *Minnesota Atlantic Transp. Co.* (C. C. A. 8), 49 F. (2d) 203, 207;
Pacific Spruce Corp. v. *San Francisco* (C. C. A. 9), 72 F. (2d) 712, 714.

Under the principle of these decisions, since the faults of the "Denderah" were "numerous and glaring" and "gross" it was not enough to raise a doubt with respect to the management of the "Mandu". There was some presumption adverse to such claim and any reasonable doubt should have been resolved in favor of the "Mandu". Any fault on her part should have been established by clear and convincing evidence. The inference by the Circuit Court of Appeals of fault on the part of the "Mandu", based solely on the fact that a serious collision occurred, was wholly unjustified. The decision of the Circuit Court of Appeals was, therefore, in conflict with the decisions of this Court and with the Circuit Courts of Appeal in all other Circuits.

The decision of the Circuit Court of Appeals was also in conflict with the decision of this Court in *The Maggie J. Smith*, 123 U. S. 349, where this Court said at pages 355-6:

"The rule is well stated by counsel, that 'if one

> vessel is brought into immediate jeopardy by the fault of another, the fact that an order other than that which was given might have been more fortunate will not prevent the recovery of full damages'; or, as stated by the Court of Appeal of England, in the case of the *Bywell Castle*, L. R. 4 Prob. Div. 219, as quoted in the case of *The Elizabeth Jones*, 112 U. S. 514, 526. 'Where one ship has, by wrong maneuvers, placed another ship in a position of extreme danger, that other ship will not be held to blame if she has done something wrong, and has not been maneuvered with perfect skill and presence of mind.'"

This principle has been repeatedly announced and applied by this Court.

> *The Elizabeth Jones*, 112 U. S. 514, 526;
> *The Sea Gull*, 23 Wall. 165, 181;
> *The Carroll*, 8 Wall. 302, 306;
> *The Nacooche*, 137 U. S. 330, 340;
> *The Oregon*, 158 U. S. 186, 204;

and by Courts of other Circuits.

> *Rideout* v. *Charles Nelson* (C. C. A. 9), 55 F. (2d) 783, 785-6;
> *The Norne* (C. C. A. 5), 59 F. (2d) 145, 148;
> *The Clara Matthen* (D. C. Mass.), 25 F. (2d) 123, 124;
> *The Shawmut* (E. D. Pa.), 261 Fed. 616, 622.

The "Mandu" navigated at all times on her proper course on her right hand side of the channel and the collision occurred on the "Mandu's" side of the channel (R. 2206). The "Denderah", through faults numerous and glaring "violated the Narrow Channel Rule and for some unexplained reason brought herself broadside across the course

of the 'Mandu'" (R. 2206). Such grossly improvident action on the part of the "Denderah" placed the "Mandu" in the position *in extremis*. She should not have been held at fault in that situation, under the principle announced by this Court in the *Maggie J. Smith*, 123 U. S. 349 *supra*, even if she did something wrong or was not maneuvered with perfect skill and presence of mind. In view of the gross faults of the "Denderah" she should have been exonerated.

CONCLUSION.

A writ of certiorari should be granted to review the decisions and orders of the Circuit Court of Appeals for the Second Circuit in this case.

Respectfully submitted,

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